UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY WINCHESTER, ET AL .

vs. . DOCKET: 08-CV-3445-RWT

OURISMAN IMPORTS, INC. . GREENBELT, MARYLAND
ET AL .
. OCTOBER 13, 2009

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: BRADFORD W. WARBASSE, ESQ.
HOWARD HOFFMAN, ESQ.

FOR DEFENDANTS: BRAD D. WEISS, ESQ.

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THE COURT: Good morning. Please be seated.

VOICES: Good morning, Your Honor.

THE CLERK: Matter before the Court is 08-cv-3445-RWT, Jeffrey Winchester, et al vs. Ourisman Imports, et al. Here for the purpose of a motions hearing. Counsel would you please identify yourselves for the record.

MR. WARBASSE: Bradford Warbasse for the plaintiffs, Your Honor.

MR. HOFFMAN: Howard Hoffman for the plaintiffs, Your Honor.

MR. WEISS: Brad Weiss for the defendants, Your Honor.

THE COURT: All right. Good morning. All right. We are here on a multitude of motions, but I think they all revolve around the plaintiff's Motion to Certify a Class Action, so let me hear argument from the Plaintiff on that.

MR. WARBASSE: Okay. Your Honor, at the first or notice stage in a collective action, the Court examines the pleadings and the affidavits to determine whether the notice should be given to the potential class members.

Because the Courts have minimal evidence at this stage, and in most cases discovery hasn't even been conducted, the District of Maryland has consistently stated that this determination is made using a fairly lenient standard and typically results in conditional certification.

And I would cite Judge Chasanow's decision in the ***Yeibyo vs. E-Park of DC*** case, 2008. The paramount issue in determining the appropriateness of a conditional class certification is whether the Plaintiffs demonstrated potential class members are similarly situated. For these purposes a group of potential plaintiffs are similarly situated when they together were victims of a common policy, scheme or plan that violated the law.

And I would cite Judge Williams decision in ***Quinteros***, it's a published decision, 532 F.Supp 2d at 772, 2008 decision, and he sites a decision by Judge Grimm, ***Williams vs. Long***, also for the same proposition.

Now, it's well settled that factual disputes do not negate the appropriateness of the court facilitated notice. In fact, law has been cited throughout our briefings that the Court is not even bound by strict rules of evidence at this stage. Hearsay is freely admissible for these purposes.

I would cite the ***Howard vs. Securitas Sec. Services*** case, which is also a recent decision, for that proposition.

This case was initially filed by two former salespeople who worked at Ourisman Imports, which runs the Mitsubishi dealership in Marlow Heights, Maryland. In April of this year Judge Williams granted conditional certification in a very similar case against Ourisman Chevrolet Company, which is located right next door to the Mitsubishi dealership. There is

common ownership, there's a common mailing address and, in fact, one of the plaintiffs in this case, the General Manager and possible owner of both dealerships, Abbas Khademi, was running both dealerships at the same time.

In that case the opt-in period had expired in September. There are now 14 plaintiffs in that case, where we proposed a scheduling order and intend to proceed with discovery.

All of the evidence relied upon by Judge Williams in granting conditional certification in that case is fully appropriate for the Court to consider in granting conditional certification in this case. You have the same management, the same ownership, the same location.

The only difference is there are two separate companies controlling two separate dealerships. In the absence of discovery, we can't say whether there is common ownership or not.

In that case numerous affidavits were submitted by salespeople saying that they weren't paid, they were paid on a straight commission basis in this case. There was no draw. They were paid weekly. If they had a sale, they were eligible for a monthly commission if their sales exceeded the weekly commissions that were paid out, but, as in this case, deductions were made for the monthly commission.

Both dealerships under Mr. Khademi had a policy of

accepting promissory notes from buyers of cars. If the buyer didn't pay on the promissory note, they deducted it from the pay of the salesperson, even though the note was presumably sent to the lender and certified that the buyer had paid the downpayment. Therefore, there were numerous months in which plaintiffs at both dealerships, auto salespersons, didn't get anything in their monthly commission check.

They got a check for zero dollars, for zero point zero zero dollars. The impact of that check, in terms of giving any sort of credit towards the minimum wage is null and void. They might as well have paid them in Confederate money, Your Honor.

In this case there was a weekly draw of $150. Now, all of the four plaintiffs have filed consents with the Court, stating that they worked more than 40 hours a week. I believe Mr. Winchester has filed a second affidavit saying that he routinely worked more than 60 hours a week. These are car salesmen. They're paid on a commission basis. Many of them work open to close, five or even six days a week.

They work a lot of hours, and when we get to trial we'll show that there were structures, there were incentives so that they had to work a lot of hours.

If they made a sale and they weren't there the next day when the buyer came in to give a down payment check, and he gave it to another salesperson, they had to split the

commission with that salesperson.

That was an incentive for them to be there around the clock, to make sure they got paid for the sales they made. They worked a lot of hours. A $150 a week does not compensate for somebody working 60 hours a week under the Fair Labor Standards Act. It doesn't come close to satisfying the minimum wage requirements.

In this case, just like the Ourisman case, Mr. Winchester has submitted an affidavit saying on numerous occasions he got monthly commission checks for zero dollars. Therefore, he was effectively working 60 hours a week or more, sometimes less, but many hours, for $150 a week.

He and all the other plaintiffs that filed consents saying that common payroll practices applied to all the salespersons. They were all similarly situated. Indeed, the defendant doesn't dispute that they had a small weekly draw. They don't dispute that there was a monthly commission check.

What they haven't yet admitted was that the commission check often times was for zero dollars. In fact, Mr. Chapman, the fourth plaintiff to file a consent to join this suit, worked there for four specific weeks we've detailed, we've given you the paychecks for each of those four weeks, showing that he received a draw for $150.

Moreover, we've given you the monthly commission check for the month following that pay period for zero dollars.

Therefore Mr. Chapman, under their pay plan, just like all four of the plaintiffs asserted in their consents, just like plaintiff Winchester submitted in great detail, explained in great detail in his first and second, in his second affidavit at least, they were not getting a monthly commission check. The only thing they got at this dealership, which was a little better than the Chevy dealership, was $150 draw check, $150 a week draw check.

We submit they were paid on a weekly basis. They chose the pay period. Because they chose it, they're bound by it. If you look at the ***Rogers vs. Savings First Mortgage*** decision by Judge Nickerson, which also relies upon a ***Sam Bell Dodge*** case involving a minimum wage claim against a dealership, he goes into great detail that an employer is not required to pay weekly, but once they choose to pay on a weekly basis, they're bound by the weekly pay period.

So, the way you determine whether they violated the law or not is you look at each week, you multiply the number of hours actually worked by the applicable minimum wage, and if they received less than that amount, which routinely $150 a week was less than that amount systematically, then they violated the minimum wage laws.

Now, it's black letter law that a factual dispute at this stage is irrelevant, does not negate the appropriateness of court facilitated notice.

I'd cite the ***Quinteros*** again, 532 F.Supp 2d at 772, also by Judge Williams, and that a merits based review is not appropriate. We're not here at summary judgment. We haven't conducted discovery. This isn't a trial on the merits. We're not required to prove the case. We're just required to satisfy this fairly lenient status in proving that there is a similarly situated group, not in proving but demonstrating that there is a similarly situated group of potential plaintiffs out there and, Your Honor, we have done that in spades.

THE COURT: All right. You've also moved for, to amend your complaint, and you have three total motions in front of me. I think two are basically withdrawn or moot, but you've got before me a motion to file a third amended complaint and let me hear your argument on that as well.

MR. WARBASSE: Well, Your Honor, two of those motions to amend the complaint were to add an additional plaintiff, Don Jarrett, the first time and Mr. Chapman the second time. The second motion was just to add more detail in the complaint, to address any heartfelt concerns the defendant had about the specificity of the complaint.

And a lot of, in my view, particularly in light of the detail contained in the proposed third amended complaint, which is the only proposed amended complaint before this Court now, a lot of the arguments were barred by the defendant based on the ***Iqbal*** case, are borderline frivolous in this context.

First, they ignore the applicable law in the Fourth Circuit with respect to FLSA decisions.

I'd cite you to the ***Rivendell Woods*** case in 2005. The Department of Labor filed a complaint alleging that the defendant failed to pay overtime for hours worked in excess of 40 hours a week. In upholding the validity of the complaint the Court stated that the sufficiency of the FLSA complaint does not depend on whether it provides enough information to prepare a defense. It's whether it puts them on notice.

It relies on the ***Hodgson*** case, in which very similar, very brief, one word allegations, one sentence allegations were made by the Department of Labor. The Fourth Circuit, again in rejecting a challenge to the sufficiency of that pleading, said that the plaintiff is not required to allege, to identify each potential class member. It's not required to identify each specific week in which the violation occurred, it's not required to identify, it doesn't have to do any of that.

This is a remedial, new deal era legislation. It's broadly construed, according to Supreme Court precedent going back 50 years. It's fifty years of Supreme Court. This, in many ways this is the favorite statute among the Plaintiff's Employment Law Bar for exactly that reason, because it is remedial legislation, and it has been so broadly construed time after time after time by the Supreme Court.

Their argument, relying on ***Iqbal*** is a serious

stretch. The Court in that case, the Supreme Court, recently stated that the determination of whether a complaint states a plausible claim for relief is a context specific task that requires the Court to draw on its judicial experience and its common sense.

Moreover, and the Court further found that, but where well pleaded facts do not permit the Court to infer more than a mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief.

In other words, the Court was saying because it doubts the plausibility of the facts alleged, that they didn't satisfy their burden of properly pleading all of the elements in that case.

It was a civil rights claim by a post 911 Muslim detainee who sued the Attorney General Ashcroft and the Director of the FBI, and alleged he was designated as a person of high interest based on his race, religion, national origin, and that Attorney General Ashcroft was the principal architect of that policy and Mueller was instrumental in instituting that policy.

The Court held, and if I may cite, moreover, the Court held that the allegations in ***Iqbal***, that ***Iqbal***, as well as other detainees were designated persons of high interest due to their race, religion, national origin, lacked plausibility given their obvious alternative explanation. Which is, of

course, when the law enforcement agencies, post the worst terrorist attack in the history of the country, are rounding up potential suspects, it's going to have a disproportionate impact in the number of Muslim detainees because those were the, that was the religious of the people who perpetrated the attack.

So, therefore, the allegations in that case did not state a claim against Attorney General Ashcroft or the Director of the FBI because they lacked plausibility.

And in this case the defendant has not shown an iota of a lack of plausibility in any of the allegations. The paychecks, the affidavits in this case and the Chapman case clearly establish a systemic violation. In this case the defendants has not demonstrated any obvious alternative explanation. Once again, we'd like to hear it, but we haven't yet.

There is a common practice of withholding moneys from the monthly commission checks that results in individuals clearly systematically being paid less than the minimum wage.

You know, Your Honor, car dealerships were around when the Fair Labor Standards Act was passed in 1938. They had a lobby group and they went to Congress and they said "Our employees work a lot of hours. You can't hold us to these overtime requirements," and they got an exemption from the overtime requirements. But Congress said "But you do have to

at least pay the minimum wage." That's all they have to do.

Unlike all the other covered employers out there who don't have a special exemption, wish they did, but weren't around or established enough when the law was passed in 1938, all they have to do is comply with the minimum wage requirements. And we don't think it's too much for this Court to grant conditional certification so that we can insure that Ourisman Chevrolet, which is a family of dealerships, founded by Mandel Ourisman back in Prince George's County 40, 50 years ago, that had $800 million in sales at 15 different dealerships two year ago, complies with it's minimal obligations to comply with the minimum wage requirements.

They've been around long enough to know what the law requires. We believe and, Your Honor, I represented the Plaintiffs in the ***Rogers vs. Savings First Mortgage*** case before Judge Nickerson with 30 plaintiffs. I used that complaint as a template in this case. We got a very good result from Judge Nickerson in that case.

I've used, I've filed scores of FLSA claims against a variety of employers in a variety of industries, and I have never had a court rule that my complaint should fail to state a cause of action under the Fair Labor Standards Act, and I certainly, particularly in view of the fact that the defendant didn't even file an answer in this case, they're just opposing a motion to amend, don't relish the possibility that the Court

should do so now.

Finally, Your Honor, I'd like to point out that the plaintiff has not cited a single decision applying ***Iqbal*** to an FLSA case. Moreover, the other case they rely upon, ***Twombly vs. Bell Atlantic***, there are a number of cases which were cited by plaintiffs in which courts ruled that that challenge to a pleading in an FLSA case was insufficient.

I would cite you to the ***McDonald vs.*** Kellogg case, a 2009 case by the District of Kansas. It's at nine of our reply memorandum, and there's other cases cited in here for the same proposition.

There's no authority that these arguments have ever prevailed in an FLSA context, in a remedial legislation such as before your court, such as we're relying on here today. Thank you, Your Honor.

THE COURT: All right. Thank you. All right. Mr. Weiss.

MR. WEISS: Judge Titus, once again, my name is Brad Weiss. Let me start off by first addressing the amendments. As you may recall when you were in private practice in Maryland State Court, one can amend literally without leave. Here we have a situation where we have, by my count it's the third amendment, but it's the fourth complaint, and I'd like to just take two minutes to talk about the history, because it goes to part of the problems I have with the plaintiff's complaint.

In the first complaint that they filed back in, I think it was December 23rd of 2008, in paragraph seven they said there are a large number of work weeks they did not receive minimum wage, and they just claimed it was a policy/procedure, no facts.

In paragraph ten, page six of that complaint, they said there were not sufficient documents or information in their possession to calculate unpaid over-time compensation.

That's the words they used in their complaint, that it was over-time compensation. They then came back and filed a first amended complaint, in which they changed the words "over time" to "minimum wage". I think they figured out in between, as counsel well knows, that the auto salespeople are exempt from over-time compensation by statute, so --

THE COURT: Well, it's not over-time compensation, it's time and a half over-time compensation. They're not exempt from being compensated at all.

MR. WEISS: No, they're entitled, like others, to minimum wage.

THE COURT: They work 60 hours, they get 60 hours of pay. They don't get time and a half for the extra 20.

MR. WEISS: That's correct. That's correct. But they titled it as over-time compensation. Perhaps that was just the words they use. They then filed and, again, without having a ruling or a hearing or a decision by this Court, they

filed a second amended complaint in which they alleged, in paragraph seven, there are many times they did not receive monthly commission payments.

So as we started to plead it, they realized somewhere along the line that these individuals were receiving some amounts of money and, quite frankly, I cited to you in my brief both the ***Olson vs. Superior Pontiac***, the ***Rogers vs. Savings*** case and the ***Marshall vs. Allan Russell Ford***, where it is appropriate in this industry to have a monthly pay period in which you have draws against that commission. It can be done, and it can be permitted.

So, they have now changed it two or three times. They've had one or two affidavits. Now, let me just talk about the affidavits for a moment. Mr. Hoffman, I believe, was involved in a case with Magistrate Judge Grimm, in which public documents or public information was permitted as an exception for the affidavits, but I submit to you that when you look at the affidavits, when you look at now the fourth amended complaint, what I'm really seeking, and what the plaintiffs have in their possession, is the ability to set forth specific allegations for the named plaintiffs.

They know exactly what their claims are, and then we can respond to it and we can go forward in this case. And that brings me to the issue I would like to address with you.

Both in the ***Purdham*** case, which is a District Court

from the Eastern District of Virginia, I think it was Judge Cacheris, against the Fairfax County Schools, talking about the certification issue and about what standard the Fourth Circuit has adopted, there isn't one yet.

And then you go back and you look at Judge Blake earlier this year in the ***Slavinski*** case, where she did not certify the class based on the allegations that were pled and the insufficiency of the affidavits. And then we look in a different context to the ***Moreno*** case that you tried last year. I saw the opinion came out in September. I'm not addressing it on the subsequent action, but you held the trial in which the plaintiff testified orally about some issue, either minimum wage or over-time or both, and in which the judgment was entered for the Defendant. And my purposes for bringing these up is that these cases are time consuming and costly and that's what Judge Blake talked about both in her 2009 and 2008 decisions that came out recently.

THE COURT: Well, they're time consuming and costly even if it's a single plaintiff case like ***Moreno vs. Hurley***.

MR. WEISS: In that context. But if you look at ***Slavinski***, which is another case that she decided, she held that she wasn't going to preliminarily certify the class because of some deficiencies in the complaints and the affidavits.

And here's what I'm trying to get to in this case.

They know how to plead it properly in this case, and I do believe that when you bring ***Twombly***, ***Iqbal*** --

THE COURT: Let me ask you this; you're in effect saying they haven't pleaded it properly, but you filed an answer to the original complaint. I mean, how are we -- are we trying to revisit the question of the sufficiency of the original complaint now when they moved to amend?

MR. WEISS: I was not involved in that at the time. I can only tell you that when they moved for leave to amend their complaint I believe it opened them up for in essence challenging their amendment and whether or not they can go forward.

THE COURT: Challenging would be when the amendment is granted and then you move to dismiss the amended complaint.

MR. WEISS: Well, I have challenged their leave to amend, and then if they get their amendment, then I can decide whether or not I answer or whether or not I move to dismiss. We haven't gotten to that point because the plaintiffs have amended without a court ruling or hearing three times.

THE COURT: Well, they haven't amended, they've asked for leave to amend.

MR. WEISS: They've asked for leave to amend three times without a ruling. I mean, one of the questions I have, and perhaps you can resolve this for us is, unlike Maryland State Court, can a plaintiff continually file an attempt to

leapfrog motions for leave to amend without having a hearing and ruling on it, and that's ultimately what you have to decide.

Now, it's easier because they have, I guess, essentially withdrawn one and two, and we're down to the third one.

THE COURT: We really only have one Motion to Amend in front of me, I mean, the Motion to file a Third Amended Complaint.

MR. WEISS: Right. And if you listen to counsel today, he's added a lot of hyperbole that are not contained within the complaint, and I'll give you some examples. If they want to allege it, that's fine, but this idea that he is essentially arguing they're a joint enterprise, he can make that allegation if he wants to.

There are two separate cases. They filed them as two separate cases. There is one case that's before another judge, but they're acting today as if the facts alleged in the third amended complaint make it a joint enterprise case.

I mean, they say it here today, but they haven't alleged it in their complaint. If they want to allege it, then we'll deal with it. And the problem I have is they want to amend these complaints, set forth exactly what it is that you want to allege and I'll either answer it or I'll move to dismiss, and that's the easy answer to it.

I've got two different affidavits which contain, I believe, hearsay. Now, some of the courts that they cited to have allowed hearsay. In Judge Grimm's case, where Mr. Hoffman was involved, I think it was dealing with public information or public documents. I believe if they're going to go forward they need to have some evidence of personal knowledge and facts.

And, so if counsel wants to allege this common enterprise, a joint enterprise, if they wanted to allege that they're all common ownership, they can make those allegations, but they've got to make it in the complaint, not in court outside the complaint. They can amend their compliment or ask the Court for leave to amend it, to do that, and then I'll respond it to.

With regard to the Motion to Certify, I suggest to the Court that we need to have a complaint that's filed and either answered or Motion to Dismiss, and then they can more forward with their Motion to Certify.

If the case is answered, if you deny the Motion to Dismiss, they're going to get their certification, there is no question about that, whatever standard is applied, but I think we're entitled to know what the playing field is.

For example, when we responded to the first amended, I gave you as Exhibit C one of the paystubs for Mr. Winchester that has showed he had made $70,000 at one point during half or

three quarters of the year.

They attached some documents as they go forward, but in the earlier pleadings they say they don't have access. The Plaintiffs can set forth concisely their case. I disagree with counsel when it comes to the ***Twombley\Iqbal*** analysis for this reason; since those decisions there have been a lot of law review articles about it. I think it does in some context apply here.

I'm not sure that it heightens the pleading standard. I think what it sets is the minimum standard by which you have to plead enough facts to make it plausible on the complaint, and if counsel wants to add in facts, as he's doing here today, put it in the complaint, if that's what they want to do, and then I can respond to it, so I have a level playing field as to where I go in this case. Thank you.

THE COURT: Where has he added facts not in the complaint?

MR. WEISS: Today?

THE COURT: Today.

MR. WEISS: He has claimed today that there is a common ownership, a joint enterprise, so to speak, today. He has discussed that, how they operate the same at Chevrolet as they do at Mitsubishi; that he says that Mr. Abbas is a manager\owner. If that's what he wants to allege, put it in the complaint, but not here, not in the court. I mean, if he

wants to allege that and if he wants to make these cases together, he can do that, or try and do that.

Then we have him withdrawing, I guess, in essence the first two complaints. I'm not sure where that puts Mr. Winchester's affidavit in light of the third amended complaint, but it seems to me that -- they're smart attorneys, they have done this before. They have got documents, obviously. If they want to allege the facts, let them put it out on the table and we'll go forward with the case.

THE COURT: All right. Mr. Warbasse.

MR. WARBASSE: Your Honor, the FLSA requires as a matter of law employers to maintain records with respect to hours worked for three years in each and every week. It requires them to maintain records of all payments made in each and every week. The Court can take judicial notice that many employees do not keep copies of all their pay checks. They are not required to maintain, unlike the employer, they're not required to maintain records of how many hours they worked.

They have all the information, or they're required to by law to have all the information necessary to make a determination as to what the damages are in this case. And I think it's -- his theory of ***Iqbal*** would require us, before conducting any discovery, to project specifically the damages for each and every week. That's just not required. The Fourth Circuit has said it's not required. In ***Hodgson*** and the

Rivendell case it's irrelevant.

Your Honor, each week under the Wage and Hour laws stand alone. You calculate the minimum wage obligations in this case on a work-week by work-week by work-week basis. That's how you do it. That's in the statute.

That's 50 years of law. It's irrelevant if somebody made $70,000.

In the ***Rogers*** case Judge Nickerson went into it in great detail. In some cases those were loan officers, some of them made over a hundred thousand dollars a year, and they still got, based on their hours of work and the failure to pay over-time in that case, and\or minimum wage, some of them got up to $75,000, because the employer didn't comply with his obligations under the wage and hour laws. How much they make on an annual basis is not relevant to the statute.

You have to look at each week during each pay period. Whether or not the Court ultimately determines, as I think it will under the ***Rogers*** case, that there is a weekly pay period or whether or not it goes to a monthly pay period, it doesn't make a dime's worth of difference in this stage, in this case.

If they didn't pay a monthly commission check, then all we're talking about is five, four, $150 draws for the month and you multiply the number of hours worked by the month, if that's the pay period, times the minimum wage, subtract what they were paid for their draws, and that's what they're owed.

If it's a weekly pay period, then you do it each and every week. It depends on what the Court determines the actual pay period in this case was. Again, we believe it's a weekly pay period, because that's what was used by the employer.

Now, Your Honor, it's perfectly appropriate for us to add additional plaintiffs as they come to us in this case. For one reason, Judge Chasanow's decision in ***Lopez*** in 2008 denied a default judgment partly on the basis that plaintiff filed an amended complaint after it filed its first notice but did not add the 16 newly consented claimants to the amended complaint.

In other words, we have two plaintiffs who were named plaintiffs and filed a consent, and they're proper parties. We have two plaintiffs who just filed a consent to opt in. But the Court, at least Judge Chasanow has ruled, that's not enough. You have to add them, you have to file an amended complaint, add them to the complaint, so that's what we did.

When Mr. Jarrett came to us we filed a motion to amend to add him. When Mr. Chapman came to us we filed a motion to amend to add him. The only additional amendment, which defendant seems put out by, is they allege that we didn't assert sufficient facts.

Well, we included a far more detailed complaint than I've ever filed in a wage and hour case, and that's what's before the Court, the proposed third amended complaints.

Joint enterprise is his words. We're not alleging

this case is tied to the pending certified class action that has 14 plaintiffs against Ourisman Chevrolet, Abbas Khademi, and the sales manager at that office.

We're just bringing to the Court's attention that in looking at the potential evidence of similarly situated, and the plausibility of the claims in making this initial certification requirement, that the Court be on notice that right next door Judge Williams has already granted conditional certification against the sister organization, which is right next door. We believe that that's relevant.

It's got one of the same defendants in this case, the general manager for the whole dealership. It's got the same mailing address. It's part of the Ourisman family of car dealerships.

There are some differences in this case. We believe this is appropriately brought as a separate case. That's why we filed it as a separate case. We're not alleging joint enterprise. We're not -- we're pursuing this as a separate claim against a separate company with some similarities, some overlap because there are some of the same defendants, there's some of the same practices, making deductions from monthly commission checks which renders them in violation of the minimum wage laws.

We think everything filed in that case the Court is perfectly entitled to take judicial notice of. So, you know,

his complaints that I'm making arguments above and beyond the scope of the proposed complaint, we strenuously object to.

THE COURT: By the way, the defense has raised questions about your affidavits. I don't think I've heard anything from you on that. What's your position on the affidavits that they're moving to strike by Mr. Winchester?

MR. WARBASSE: Well, Your Honor, there's two things. First, the most recent consent to be a party plaintiff, which was filed on behalf of Mr. Chapman, which includes his pay checks and the monthly commission check for zero dollars, and in this he states, signed in August '09, filed with the Court, "During the above time period I did not receive the minimum wage for any of the weeks that I worked for Ourisman Mitsubishi. Although I worked far more than 40 hours a week, the only compensation I received from Ourisman Mitsubishi was a weekly payment of $150, see checks attached as Exhibit A. The only monthly commission check I received from the defendant was for no dollars and zero cents." So that's a separate statement that we believe the Court should consider.

The affidavits of Mr. Winchester clearly allege, based on his personal knowledge, that he was paid less than the minimum wage for numerous work weeks.

If you look at the second affidavit, it goes into great detail that there was a common pay plan or practice with respect to all the salespeople at the Mitsubishi dealership.

They were paid $150 weekly draw. They were eligible for monthly commission if they earned enough from sales above and beyond the weekly draw and if they didn't have any deductions from their monthly commission check for unpaid promissory notes.

We even attached to a second affidavit a list of promissory notes that was maintained for a specific month in question showing outstanding unpaid promissory notes from which deductions would be made.

Mr. Winchester has testified that for at least two consecutive months he did not receive a monthly commission check, so that for an entire two month period he was effectively working 60 or more hours for $150 a week.

All of his allegations are incorporated into the proposed third amended complaint. I would refer to paragraph seven, which goes into some detail, paragraph eight, paragraph nine and paragraph ten.

Mr. Winchester worked at this dealership for, I believe it was over four years. There were many times where he talked to other car salesman, where they got together and they complained about not being paid, about getting monthly commission checks for zero dollars.

He's testified in his affidavit that he saw commission checks for zero point zero zero dollars that were given to other salespeople. He's testified that he personally

received those checks. He's testified that he and many other salespeople did not receive the required minimum wage. That's all based on personal knowledge.

Now, if he wants to argue it's hearsay, we're at the wrong stage. This isn't summary judgment stage, this isn't a hearing on the merits.

THE COURT: What law is there that would require that affidavits at this stage be in the format of a summary judgment affidavit? Is there any? I mean, I'm not aware of any.

MR. WARBASSE: No. No. I don't believe so. I mean, I think the Court's free to look at the pleadings, look at the consent forms and consider the affidavits. I mean, obviously, the more affidavits, the more documents you have, the better.

I mean, initially this case was filed with two plaintiffs. The other plaintiff had only worked there for four months. If defendant wanted to prove, as they contend, opposing the Motion for Certification that he was fully paid the minimum wage, all they had to do was produce four monthly commission checks for that four months and knock that out. Just show us.

We're alleging that he got checks for zero point zero zero dollars, that there are months the only thing he got was $150 a week, and he worked upwards of 50 or more hours. They contend that's not true, they could be paid a monthly commission check. Well, they could have produced four monthly

it should have been easy to demonstrate that the other original plaintiff was fully paid the minimum wage for his four months of work. They didn't bother to do that.

They even attached vacation pay and other checks, which are entirely irrelevant to the minimum wage claim, which are on the face, because you're not entitled to the minimum wage -- you're only entitled to minimum wage for those hours that you actually work.

Now, Your Honor, we don't believe we're being dilatory. You know, I don't want to accuse counsel of over-litigating this, but I think some of the arguments are bordering on absurd.

To argue that he is not in a position to respond to the complaint that has been filed in this case, which is more detailed than any FLSA complaint I have filed in my life. Your Honor, I have been practicing law for almost 25 years. I spent 18 years at Gordon Feinblatt as a member and an associate. I've had my own plaintiff's employment law practice since 2003.

This is the most detailed Fair Labor Standards Act Complaint in term of the factual allegations that I've ever filed. I think we've gone above and beyond the cause to address any concerns the defendants may have, and I think their protests at this stage are frivolous. And we believe that the Motion for Certification has been fully briefed and it should be granted at this point. Thank you.

MR. HOFFMAN: Your Honor --

THE COURT: Anything further, Mr. Weiss?

MR. HOFFMAN: May I just add one point, to address one of your concerns. The admissibility of evidence at the conditional certification stage, courts are -- there is a split among certain courts, District Courts. The Fourth Circuit certainly hasn't spoken on it.

The U.S. -- None of the courts, none of the judges within this District have spoken on it, but the ***Securitas*** case that we've dropped off this morning and highlighted does indicate that courts are split on whether it's appropriate to consider inadmissible evidence, such as hearsay, at this stage.

But the ***Securitas*** case has what I believe to be a very excellent analysis of whether to allow admissible evidence in at this stage, and it concludes that inadmissible evidence can be allowed in at the conditional certification stage primarily because discovery has not yet begun. Thank you.

THE COURT: All right. Anything further, Mr. Weiss?

MR. WEISS: Just a couple points. Counsel now says it's not a joint enterprise case, but that's what he argued for a while. And the issue here today is whether or not you're going to grant leave to amend, and then I can consider whether or not we answer or we file a motion to dismiss. Most likely it's an answer in the case.

About putting documents into evidence, he says "Well,

you can put documents in evidence." Yes. I mean, either we'll answer the lawsuit if you grant the motion for leave, depending on which one it is, or we'll move for summary judgment if we want to attachment those documents.

It seems to me that if you're going to grant the leave, we ought to address that issue, get the case at issue and then we can address the certification issue.

I don't know what I'm going to do if you grant it as to whether or not we answer it or we make some motion. More likely than not it's an answer, but it seems to me that it would be more appropriate to address it in that fashion.

The listing of promissory notes and everything else indicates to me that when you look at the first complaint to the now third amended complaint, the plaintiffs know an awful lot more. Now, whether they learned it or they always had it and they held it back.

Let me just address one issue that counsel raised with regard to the pay period that we are going to have a legal fight over, and that is is that whether or not it's weekly or whether it's monthly, because it makes a difference in this case.

Now, maybe now is not the time to address it, but it's an issue we're going to address. They assume in the affidavits of Mr. Winchester that it is as a matter of his factual statement weekly, yet they submit in the third amended

complaint, I think in paragraph either seven or ten, they put in parenthesis weekly/and/or monthly, and they seem to concede now, which I think they should, which is that automobile salespeople can have a regular pay period of a monthly commission as their pay period for determining whether or not they meet minimum wage over the month period.

I'm asking if you're going to grant the motion for leave to amend. If that's what you're going to do, that we be given a chance, a period of time to either answer or file another responsive pleading and then we address the certification.

I may consent to it at that point. If we answer it, I may consent to the form and the notice that they want to use, by I think we need to be at issue before we get there.

THE COURT: Um hum.

MR. WEISS: With regard to the leniency issue, you know Judge Blake decided in the ***Slavinski*** case, I think it was January of 2009, I have the citation if you want, there was an affidavit attached to the complaint, and there instead of granting the preliminary certification, she did a little bit of discovery between the parties in good faith and then came back to address it, acknowledging the issue about the cost and expense of doing it.

I have concerns about the plaintiff's claims in this case. Maybe we have to address it ultimately in discovery, and

it seems to me the better way to do that, if you're going to grant the leave, is give us an opportunity to respond. If you want to do some limited discovery and then come back on the issue of conditional certification, we can do that for both parties.

I only have two document requests from Mr. Winchester, and a fairly short deposition I'd want to ask him.

Let me just say this to you, Judge Titus, if we're going to talk about experience, I've done plaintiff's cases of these kind, and in cases where I have represented the plaintiff, not to tell the plaintiffs what to do, if a plaintiff has worked, they're entitled under the Fair Labor Standard Act cases, to put together their own calendar of dates they claim they worked, if there's a challenge to the employer's time sheets and records. So the plaintiffs have the ability to ask their clients what their claims are.

Do they have to do it with specificity, meaning saying this is the exact number, no. But they have the capacity to ask their clients to say "You worked an average of X number of weeks you didn't get paid and here's what we think is the minimum wage that's due and owing."

They can do that easily. I've done that in cases. And, in fact, if it turns out that the employer does not have all adequate records or the records are insufficient, the

courts can accept the plaintiff's recreation of their own time records in cases.

So, in that regard, Judge Titus, if you're focusing just on the third amended complaint and not the others, if you're going to grant it, I ask for sufficient time to respond to it. If you're going to look at the certification issue, what I would ask you to do instead, because I think this is a case that should be mediated, is do some limited discovery, if that's what you want to do, as opposed to certify, and let them take a deposition and we'll take a deposition and see where we are in 60 days or 90 days and take it in a more incremental manner. Thank you.

MR. WARBASSE: Your Honor, if I could point out, there is a Statute of Limitations issue in this case. Counsel is very capable, trying to kick the can down the road. For every week which passes without certification and having potential class members join the action, they're losing one week of economic damages. They have complete authority to cure the problem perspectively, so what you're trying to do if you're defense counsel is you try and run the clock to minimize your damages and to reduce your damages, and that's really, I suspect, what's at play here. This is an effort to deprive potential plaintiffs of their economic relief.

I would point out that Judge Williams in the, in response to our motion in the Chevrolet case, did grant a

tolling motion to equitably toll the Statute of Limitations until the class was finally formatted, going back to the date the conditional certification was initially -- the Motion for Conditional Certification was initially filed.

And if Your Honor is inclined to delay the case, we would request that you also issue a toiling motion with respect to all claims by current plaintiffs and potential plaintiffs, going back to the date of the filing of the initial Motion for Conditional Certification.

We don't believe that that is appropriate. Counsel did not move to dismiss the original complaint in this case. They filed excessive arguments with respect to each and every straightforward motion to amend. They are running the clock and kicking the can down the road in their own economic interests.

And, Your Honor, each and every week stands alone. It doesn't matter whether you're in the car business or any other business. And if look at the decision by Judge Nickerson's case in which he relies on the ***Sam Bell Dodge*** case, which is squarely, one hundred percent on point, in that case a dealership was found to have a weekly pay period for their minimum wage claims with respect to auto salespersons, and that's what Judge Nickerson found was applicable in the ***Saving First Mortgage*** case.

He rejected the arguments that have been advanced

here, that there was a monthly or yearly even pay plan at issue.

It's particularly absurd to me to argue it's a monthly pay period where they don't even, often don't even pay anything on the monthly pay period. The only pay period where people actually got money on a consistent basis, on a regular basis, was the weekly payment of $150.

We believe there is a weekly pay period. We believe that that was the pay period selected by the employer, and under the prevailing law in this district it's a weekly pay period. Again, at this juncture it doesn't matter, but I just don't know what to say. I'm just concerned that this case is getting out of hand, and we're going to be arguing again over certification in 2010 if the Court does not seize control. Thank you.

THE COURT: All right.

MR. WEISS: Can I just say one thing on this tolling. If he's asking for tolling, I won't object to it.

THE COURT: All right. Well, I have before me today a multitude of motions in this Fair Labor Standards Act case, which was filed originally in December of last year, December 23, 2008. The -- An Answer to the Complaint was filed on April 24th, and I recall that upon the filing of that Answer I scheduled a telephone status conference, as I normally do in such cases, at the outset of the case, because I'd issued a

scheduling order which would authorize discovery.

When I conferred with the parties telephonically on May 27th, the parties requested that I lift the scheduling order and give the plaintiff the opportunity to file a Motion for Conditional Certification, and that it would be more appropriate once that issue had been addressed, to have the case proceed with possible mediation.

Since that time there has been a Motion filed for Conditional Certification, which is one of the many motions in front of me today. But let me address the multitude of motions I have before me.

First, as the case has progressed and additional plaintiffs have come to light, and there's been pleadings by the parties addressed to the issue of conditional certification, the plaintiff has sought to file first an amended complaint, then a second amended complain, and now a third amended complaint.

The plaintiff has withdrawn the first and second motions, which obviously are mooted by the filing of the Motion for Relief to File a Third Amended Complaint. So the real question before me is whether I permit the filing of the Third Amended Complaint.

And, as counsel for the defense points out, there is a significant difference between the practice in the Maryland state courts, under which leave of court is not required to

amend a complaint as long as you're at least 30 days away from trial.

That is the Maryland judiciary's perhaps simpler means of implementing the notion of freely granting leave to amend, basically permitting it as a matter of course, unless you're close enough to trial that it would be prejudicial to the other side.

The federal courts are not quite that liberal, but Rule 15(a)(2) specifically states that the Court should freely give leave when justice so requires.

In this case the amendments that have been made to the complaint are in basically two categories, one to add additional plaintiffs which, of course, is appropriate, and the second is to address some of the complaints made by the defense in response to the Motion to Certify the class action.

I find under these circumstances that it would be entirely appropriate to permit amendment of the complaint in this case, and accordingly I will grant Paper number 31, which is the Motion to Amend or Correct the Complaint, and will direct that the proposed Third Amended Complaint be filed.

I will, of course, deny as moot the Papers 26 and 20, which are the motions to file an amended complaint and a second amended complaint.

The major issue before me today is the Motion to Certify a Class Conditionally under the Fair Labor Standards

Act. That has produced some satellite motions challenging the affidavit of Jeffrey Winchester, and the defense contends that the affidavit is deficient because, among others, it's not based on personal knowledge and the evidence is not necessarily admissible.

That is the kind of argument one would make if the affidavits in question were summary judgment affidavits, which have the enhanced requirements under Rule 56 that they be on personal knowledge and show evidence that would be admissible. That is not the case, in my judgment, in terms of an affidavit in support of a Motion for Certification Conditionally of an FLSA, and I would align myself to the comments of the District Judge cited to me by the plaintiff.

With regard to the question of certifying this as a class action and the related question of whether I should permit some discovery, I've looked at the proposal for limited discovery, and while I might be tempted to accept that invitation as a way of avoiding having to make a decision on the certification question, I find that the discovery that is proposed is not too far away from what would be full blown discovery in this case, and I just don't think that we need to delay this case that long.

I have reviewed the applicable case law. I have reviewed the memorandum opinion of my brother, Judge Williams, in the very similar case of ***Sharn Chapman vs. Ourisman***

Chevrolet, and believe, as did Judge Williams, that the showing necessary for conditional certification has been made in the complaint, in the supporting affidavits in this case.

The burden required to do that has been stated in many cases as being a relatively modest factual showing that there are other similarly situated plaintiffs, and in this case I believe that has been done. We now have a total of four plaintiffs before me, and I certainly think that this case should now move ahead.

I have entered a scheduling order previously and withdrawn it so we could get over the hump of whether there is conditional certification or not. I am going to grant the Motion for Conditional Certification.

I am going to deny the Motion to Strike the Affidavits of Jeffrey Winchester. I have already indicated that the earlier motions to amend are denied as moot. I am going to deny as moot the Motion for Discovery, in light of the fact that I have granted conditional class certification, and I'm going to reissue a scheduling order at this time.

The question of tolling has been raised, but only at this hearing and not in any papers. It was raised in papers before Judge Williams. If the parties can reach agreement on an appropriate order that would provide for equitable tolling, I would be glad to do that.

I'm going to do the same thing that Judge Williams

did, and that is I'm going to direct the two of you to talk to each other about the form, manner and means of notification, as well as equitable tolling and submit to me, if you can reach agreement, an agreed order.

I will also, unless you would object to doing so, refer this matter for mediation now. I'm a large fan of early mediation, and this case, it seems to me, would be very appropriate for that. It may be that the two of you may believe that some discovery prior to a mediation session would be helpful, and I'll leave it up to you. That may very well be.

You're not going to be able to get before a magistrate judge that quickly. It's going to be a month or two, so there may be a golden opportunity, once I have issued the scheduling order, which I will do, to do some of that initial discovery.

And, as you recall from the telephone status conference we had, and the memo I issued, the discovery is supposed to be a cooperative, consultative process, so in light of the statements made by counsel today concerning the possibility that some discovery would be helpful to mediation, I certainly think the two of you are adults, both sides are adults, can work together on what type of discovery would be appropriate to give you the minimum tools that you need to participate meaningfully in mediation.

So, for those reasons I am going to enter an order today that, as I indicated, grants the Motion to Certify the Class Action; denies the Motion to Strike the Affidavits of Jeffrey Winchester; denies as moot the motions to amend; denies as moot the Motion for Discovery in light of the fact that I have granted conditional class certification and I'll grant the Motion to File the Third Amended Complaint and direct that that be filed.

I will order mediation. I will issue a scheduling order and I will invite the parties to confer on the form of the order, as well as on language that would provide for equitable tolling. All right.

MR. WEISS: Can I have 20 days to respond to the amended motion?

THE COURT: I think you have a matter of right to do that, yes. I'll put that in the order, to response within 20 days. I'll pick a date that is a little more than 20 days to make it an even date. All right.

MR. WEISS: Thank you, Your Honor. One last question. Do you want us to go down to which magistrate judge to look at mediation?

THE COURT: To do what?

MR. WEISS: Do you want us to go down to one of the magistrate judges, whether it's Judge Day or Judge Schulze?

THE COURT: Well, what happens when I order mediation

is the Administrative Magistrate Judge for this division is Judge Schulze. She would get the request and either do it herself or refer it to one of her colleagues. So, if you want to go today, I mean, I can tell Judge Schulze. If you both want to go, I'll tell her.

MR. WEISS: I'd just like to see what dates are available, because I know they have clients and I have clients.

MR. WARBASSE: Normally the judge writes you and gives you a schedule.

THE COURT: Usually the judge to whom it is assigned sends you out a letter, says "Hello. I'm your Magistrate Judge for mediation." Then the two of you can get on the phone with each other.

MR. WEISS: I'll wait. That's fine.

THE COURT: Thank you, counsel.

COURT REPORTER'S CERTIFICATE

-oOo-

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date:

/s/

Sharon O'Neill